MITRALAND KOTA DAMANSARA SDN BHD v. KETUA PENGARAH HASIL DALAM NEGERI

HIGH COURT MALAYA, KUALA LUMPUR
NOORIN BADARUDDIN J
[APPEAL NO: WA-14-39-07-2020]
31 OCTOBER 2021

Abstract – *A property developer's payment made to a State Government in relation to the sale of Bumiputera quota house units to non-Bumiputera are expenses that are not just 'wholly and exclusively' borne for the purpose of generating income, it is also closely related, incidental and relevant to the property developer's business. Thus, such payment/expenses should be made deductible under s. 33(1) of the Income Tax Act 1967.*

REVENUE LAW: *Income tax – Deduction – Claim for deduction of expenditure paid to State Government in relation to sale of Bumiputera quota house units to non-Bumiputera – Whether allowed for tax deduction under s. 33(1) of Income Tax Act 1967 _ Whether payments made in course of operating property developer's business – Whether expenditure was revenue as opposed to capital in nature – Whether there was asset or enduring benefit acquired by payments – Whether property developer acted in good faith*

REVENUE LAW: *Income tax – Special Commissioners of Income Tax ('SCIT') – Deciding order – Appeal against – SCIT determined property developer's claim for deduction of expenditure paid to State Government in relation to sale of Bumiputera quota house units to non-Bumiputera not allowed for tax deduction under s. 33(1) of Income Tax Act 1967 – Whether payments made in course of operating property developer's business – Whether expenditure was revenue as opposed to capital in nature – Whether there was asset or enduring benefit acquired by payments – Whether property developer acted in good faith*

This was an appeal by the appellant against the deciding order ('DO') of the Special Commissioners of Income Tax ('SCIT'). By the DO, the SCIT had determined that the appellant's claim for deduction of expenditure paid to Selangor State Government through the Lembaga Perumahan dan Hartanah Selangor ('LPHS') in relation to the sale of Bumiputera quota house units to non-Bumiputera was not allowed for tax deduction under s. 33(1) of the Income Tax Act 1967 ('ITA'). The SCIT had further determined that the respondent's imposition of penalty under sub-s. 113(2) of the ITA was fair, reasonable and in accordance with the law. Accordingly, the SCIT affirmed the notice of additional assessment for the year of assessment 2014 amounting to RM1,379,649.25 issued against the appellant. The amount of penalties imposed on the appellant pursuant to s. 113(2) of the ITA of the same year of assessment was RM344,912.31. Dissatisfied with the

A determination of the SCIT, the appellant field a notice of appeal. The SCIT issued a case stated ('CS') for the opinion of the High Court on whether the determination of the SCIT was correct in law. The issues raised for the determination of the SCIT was whether the sum of RM5,518,597 ('payments') paid to the State Authority of Selangor for the year of B assessment 2014 to procure the approval of the State Authority to sell units of development reserved for Bumiputera to non-Bumiputera were deductible pursuant to s. 33(1) of the ITA and should the penalty of RM344,912.31 be imposed in the event the Government charges are held as non-deductible. The SCIT had concluded that the amount equivalent to the Bumiputera C discount as well as another 5% payment for selling the Bumiputera quota units before obtaining the approval of the State Authority was not expenditure wholly and exclusively incurred in the production of income pursuant to s. 33(1) of the ITA as well as capital in nature. It was the appellant's contention that (i) the sale of the Bumiputera quota units was made with the approval of the State Authority subject to the payment of a D levy. As such, the payments of 7% (for the commercial units) and 10% (for the residential units) to the State Government were not penalties but for obtaining the approval to sell the Bumiputera units to the non-Bumiputera; (ii) s. 39 of the ITA does not prohibit penalty for deduction. The appellant had to incur the charges to sell the Bumiputera units to non-Bumiputera as E it was a condition of the approval that an amount equal to the Bumiputera discount be paid over to the State Government. In this case, the approval to sell to the non-Bumiputera was granted and as such the sale was not a prohibited act and the payment of 5% to LPHS was not a penalty; (iii) the payment made to the State Government was made and incurred wholly and F exclusively for the production of income and not capital in nature as there was no creation of any new identifiable asset. The appellant submitted that the SCIT had taken into account irrelevant considerations and that the case stated disclosed errors of law and facts. The respondent, however, argued that (i) the nature of the expenses incurred by the appellant was for the G purpose of getting the permission of the State Authority to enable the reserved quota for the Bumiputera to be released so that the appellant could sell it to the non-Bumiputera. As such, it was capital in nature and the expenditure/payment was not incurred wholly and exclusively in the production of income; (ii) the sum of RM5,518,597 paid to the State Government thereafter would allocate certain percentage in order to enable H the appellant to effectively generate their income, *ie*, to enable the appellant to sell the unsold reserved units for Bumiputera to the non-Bumiputera. Therefore, the payment was not made wholly and exclusively in the production of income but it was necessarily for the production of income; (iii) by making the payment to procure the permission from the State I Authority, the appellant had obtained advantage in terms of enduring benefit of the business, *ie*, enabling the appellant to sell the units to the non-Bumiputera prior to producing the income and as such was a payment/

expenditure which was capital in nature and did not rank for deduction under s. 33(1) of the ITA; and (iv) the LPHS had imposed penalty on the appellant because the appellant had violated the terms of the quota and as such the penalty imposed on the incorrect assessment made by the appellant was correct and fair based on the facts that the appellant had deducted the expenses that was not deductible under s. 33(1) of the ITA.

Held (allowing appeal):

(1) It is trite law that in order to qualify for deduction under s. 33(1) of the ITA, the expenditure must be wholly and exclusively incurred in the production of the taxpayer's gross income. The question whether a particular payment is capital or revenue is basically a question of fact and every case must be considered on its own facts. In the instant matter, the SCIT had found that the payments of 7% (commercial units) and the 10% (residential units) by the appellant was made by the appellant as it had violated the condition imposed by the State Government before the approval was granted for the release of the Bumiputera units to be sold to the non-Bumiputera. The SCIT's finding was flawed. On the one hand, the SCIT stated that the appellant had violated the condition imposed by the State Government. However, the SCIT had also admitted that approval was in fact given to the appellant to release the Bumiputera units to be sold to the non-Bumiputera. Thus, the payments of 7% (commercial units) and 10% (residential units) to the State Government were payments made for approval to sell the Bumiputera units to the non-Bumiputera. The payments could not be said to be a fine or penalty because there was in fact no issue of the appellant violating the condition imposed after all. (paras 19-22)

(2) The agreed fact was that without making the payment the Bumiputera units could not be transferred or released to the non-Bumiputera. It could not be disputed that without the payments being made, the appellant would not have been able to sell the Bumiputera units to the non-Bumiputera purchasers and generate its income. By selling the Bumiputera lots to non-Bumiputera, it directly generated the appellant's income as a property developer. Once the appellant's business had commenced, there could never be a distinction before what was incurred for or in the production of income. The appellant needed to return the Bumiputera discount to the State Government. The character of the payment was unequivocal. The payment was in fact made in the course of operating the appellant's business. The expenses or payments incurred by the appellant were not just 'wholly and exclusively' borne for the purpose of generating income, it was also closely related, incidental and relevant to the appellant's business. Thus, such expenses/payment should be made deductible under s. 33(1) of the ITA. (paras 24 & 25)

(3) The appellant, being unable to sell the Bumiputera units, opted to obtain the release of the units to sell to non-Bumiputera purchasers. It was necessary and integral for the appellant to do so and it could not be disputed that the payment flowed from the act forming the essence of the appellant's business and done for the purpose to earn revenue. The payment was therefore unavoidable for otherwise the appellant would not be able to generate its income. It was obvious that the appellant's purpose or object behind the payment was to procure a benefit, which was purely a business one. The payment was not of capital in nature since the appellant had, all along, the right to sell. The payment was made so as to enable the appellant to widen its group or class of people it could sell to. The payment was therefore a business normal payment in order to produce income. (paras 28 & 29)

(4) It could not be disputed that the refunds to LPHS recur every instance a Bumiputera lot is sold to a non-Bumiputera buyer, and as such it is a clear indication that the expenditure is revenue, as opposed to capital in nature. Further, the payment made to the State Government *via* the LPHS could not be said to have enriched or have improved the asset of fixed capital on the part of the appellant. The appellant was returning the Bumiputera discount in order not to be in contravention of the Pekeliling Lembaga Perumahan dan Hartanah Selangor Bil. 1 Tahun 2011. In so far as the enduring benefit and identifiable tests were concerned, the appellant could not be said to have acquired any asset or advantage for the enduring benefit of its business. There was no asset or enduring benefit that had been acquired by the payment. (paras 33, 35, 36 & 39)

(5) The appellant would not make further profit again through the reduction of taxable income after deducting these expenses as the appellant declared the full non-Bumiputera price stated in the invoice or sale and purchase agreement as the turnover, and not the discounted Bumiputera purchase price. As such, the appellant was merely reducing its taxable income to the true income amount, excluding payments of the Bumiputera discount which the appellant was obliged to pay. (para 50)

(6) The wordings in s. 113(1) and (2) of the ITA do not apply to situations where there is a difference of opinion between the respondent and the taxpayer on the interpretation of a particular provision of the ITA even when the court ultimately finds in favour of the respondent. This was not a case where the taxpayer had filed an incorrect return by omitting or understating its income or gave incorrect information relating to matters affecting its chargeability to tax. The appellant had taken reasonable and genuine position in submitting its returns and took the view that the payments made to the State Government were deductible.

The appellant had acted in good faith and made full disclosure. The decision of the SCIT was wrong in law in light of the clear statutory provisions that supported the fact that the payment made by the appellant was deductible. There were merits in this appeal and therefore, the decision of the SCIT was reversed. (paras 54-56)

Case(s) referred to:

Ampat Tin Dredging Ltd v. Director-General Of Inland Revenue [1982] CLJ 193; [1982] CLJ (Rep) 402 HC ***(refd)***
BN Ketua Pengarah Hasil Dalam Negeri [2009] MSTC 3, 828 ***(refd)***
British Columbia Ltd v. Her Majesty The Queen [1999] 3 SCR 804 ***(refd)***
British Insulated and Helsby Cables Limited v. Atherton [1926] AC 205 ***(refd)***
Canadian Imperial Bank of Commerce v. Her Majesty The Queen 2013 FCA 122 ***(refd)***
Cape Brandy Syndicate v. IRC 12 TC 358 ***(refd)***
Day & Ross Limited v. Her Majesty The Queen [1977] 1 FC 780 (TD) ***(refd)***
Director-General Of Inland Revenue v. Kulim Rubber Plantations Ltd [1980] 1 LNS 141 FC ***(refd)***
Ensco Gerudi (M) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2016] 1 LNS 704 HC ***(refd)***
Exxon Chemical (Malaysia) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2005] 4 CLJ 810 CA ***(refd)***
Inland Revenue v. Carron Company 1968 SC (HL) 47 ***(refd)***
Ketua Pengarah Hasil Dalam Negeri v. Firgos (M) Sdn Bhd [2014] 8 CLJ 943 HC ***(refd)***
Ketua Pengarah Hasil Dalam Negeri v. Kim Thye & Co [1992] 4 CLJ 2079; [1992] 1 CLJ (Rep) 135 SC ***(refd)***
L Sdn Bhd v. Comptroller General Of Inland Revenue [1985] 1 BLJ 218 FC ***(refd)***
Lawson (Inspector of Taxes) and Johnson Matthey Plc [1992] 2 AC 324 ***(refd)***
Luxor Network Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2017] 1 LNS 1714 HC ***(refd)***
National Land Finance Co-Operative Society Ltd v. Director General Of Inland Revenue [1993] 4 CLJ 339 SC ***(refd)***
Pasdec Corporation Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2016] 10 CLJ 493 HC ***(refd)***
Prima Nova Harta Development Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri (Rayuan No: WA-14-7-12-2019) (Unreported) ***(refd)***
Strong & Co of Romsey Limited v. Woodifield (1906) AC 448 ***(refd)***
Taman Equine (M) Sdn Bhd dan Ketua Pengarah Hasil Dalam Negeri (Rayuan Sivil No: WA-14-21-06-2020) (Unreported) ***(refd)***
Tucker (Inspector of Taxes) v. Granada Motorway Services Ltd [1979] STC 393 ***(refd)***
Vallambrosa Rubber Co Ltd v. Farmer (Surveyor of Taxes) 5 TC 529 ***(refd)***

Legislation referred to:

Income Tax Act 1967, ss. 33(1), 39(1), 113(1), (2)

Other source(s) referred to:

Chin Yoong Kheong, *Malaysian Taxation*, pp 151, 152

For the appellant - Francis Tan & Brandon Shen; M/s Azman Davidson & Co
For the respondent - Ahmad lsyak Mohd Hassan; SRC & Nordiana Sham; RC

Reported by Suhainah Wahiduddin

A

JUDGMENT

Noorin Badaruddin J:

[1] This is an appeal by the appellant against the deciding order ("DO") of the Special Commissioners of Income Tax ("SCIT") made on the
B 18 October 2019.

[2] By the DO the SCIT had determined that the appellant's claim for deduction of expenditure paid to Selangor State Government through the Lembaga Perumahan dan Hartanah Selangor ("LPHS") in relation to the sale of Bumiputera quota house units to non-Bumiputera is not allowed for tax
C deduction under s. 33(1) of the Income Tax Act 1967 ("ITA").

[3] The SCIT had further determined that the respondent's imposition of penalty under sub-s. 113(2) ITA was fair, reasonable and in accordance with the law. Accordingly, the SCIT affirmed the notice of additional assessment for the year of assessment 2014 dated 9 December 2016 amounting to
D RM1,379,649.25 issued against the appellant. The amount of penalties imposed on the appellant pursuant to s. 113(2) ITA of the same year of assessment is RM344,912.31.

[4] Being dissatisfied with the determination of the SCIT the appellant filed a notice of appeal on the 29 October 2019.
E

[5] On 12 May 2020 the SCIT issued a case stated ("CS") for the opinion of the High Court on whether the determination of the SCIT was correct in law.

Facts Before The SCIT

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[6] The facts found by the SCIT are set out in paras. 10.23 to 10.24 of the CS and reproduced as follows:

> 10.23 Secara ringkasnya, Perayu adalah sebuah syarikat yang terlibat dalam pembangunan hartanah. Dalam membangunkan satu projek yang
G melibatkan pembangunan komersial (2 blok perniagaan dan 1 blok pejabat) dan 1 blok pangsapuri servis di atas tanah Lot 53298 (PT 9793), Kota Damansara, Daerah Petaling Selangor, Perayu telah membuat rayuan dan memohon kepada Lembaga Perumahan dan Hartanah Selangor (selepas ini dirujuk sebagai "LPHS") untuk mendapatkan kelulusan untuk mereka diberikan pelepasan kuota jualan Bumiputera (rujuk surat Perayu di m.s.
H 4-5 bertarikh 25.3.2013, di m.s. 10 bertarikh 10.10.2013, di m.s. 13-14 dan di m.s. 15-16, kedua-duanya bertarikh 27.5.2014, di m.s. 21 dan 22, kedua-duanya bertarikh 24.7.2014 semuanya dalam Ikatan B1).
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> 10.24 Rayuan Perayu kepada LPHS telah diluluskan tertakluk kepada bayaran yang berikut:
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> I (i) bagi unit pembangunan yang direzabkan kepada Bumiputera yang telah dijual kepada pembeli bukan Bumiputera sebelum kelulusan diperolehi, Perayu dikenakan syarat bayaran balik antara 7%-10%

potongan harga Bumiputera (mengikut jenis unit pembangunan) dan 5% caj pelanggaran mekanisme pelepasan kuota Bumiputera daripada harga jualan unit pembangunan yang berkenaan;

(ii) bagi unit pembangunan yang direzabkan kepada Bumiputera yang masih belum dijual kepada pembeli bukan Bumiputera (dalam erti kata lain dijual selepas kelulusan diberikan), Perayu hanya dikenakan syarat bayaran balik antara 7%-10% potongan harga Bumiputera sahaja (mengikut jenis unit pembangunan); dan

(iii) bayaran perlu dibuat sebelum hakmilik boleh didaftarkan.

(rujuk surat-surat LPHS bertarikh 27.5.2013 di m.s. 6-9, bertarikh 21.11.2013 di m.s. 11-12, bertarikh 27.6.2014 di m.s. 17-18 dan 19-20, bertarikh 26.8.2014 di m.s. 23-24 dan 25-26, semua surat tersebut dalam lkatan B1).

The Issues Before The SCIT

[7] The issues raised for the determination of the SCIT was whether the sum of RM5,518,597 ("payment/s") paid to the State Authority of Selangor for the year of assessment 2014 to procure the approval of the State Authority to sell units of development reserved for Bumiputera to non-Bumiputera are deductible pursuant to s. 33(1) ITA and should the penalty of RM344,912.31 be imposed in the event the Government charges are held as non-deductible.

The SCIT's Grounds Of Decision

[8] The SCIT's grounds of decision are found in paras. 10.25 to 10.49 of the CS. The SCIT had concluded that the amount equivalent to the Bumiputera discount as well as another 5% payment for selling the Bumiputera quota units before obtaining the approval of the State Authority was not expenditure wholly and exclusively incurred in the production of income pursuant to s. 33(1) ITA as well as capital in nature.

Summary Of The Appellant's Contentions

[9] It is the appellant's contention that the sale of the Bumiputera quota units was made with the approval of the State Authority subject to the payment of a levy. As such the payments of 7% (for the commercial units) and 10% (for the residential units) to the State Government are not penalties but for obtaining the approval to sell the Bumiputera units to the non-Bumiputera.

[10] The appellant added that s. 39 ITA does not prohibit penalty for deduction. The appellant had to incur the charges to sell the Bumiputera units to non-Bumiputera as it is a condition of the approval that an amount equal to the Bumiputera discount be paid over to the State Government. In this case, the approval to sell to the non-Bumiputera was granted and as such the sale was not a prohibited act and the payment of 5% to LPHS is not a penalty.

[11] It is further argued that the payment made to the State Government was made and incurred wholly and exclusively for the production of income and not capital in nature as there is no creation of any new identifiable asset.

[12] The appellant submits that the SCIT has taken into account irrelevant considerations and that the case stated discloses errors of law and facts.

Summary Of The Respondent's Contentions

[13] The respondent submits that the nature of the expenses incurred by the appellant is for the purpose to get the permission of the State Authority to enable the reserved quota for the Bumiputera to be released so that the appellant can sell it to the non-Bumiputera. As such it is capital in nature and the expenditure/payment was not incurred wholly and exclusively in the production of income.

[14] It is submitted that the sum of RM5,518,597 paid to the State Government is made to comply with the conditions imposed where the State Government thereafter will allocate certain percentage in order to enable the appellant to effectively generates their income ie, to enable the appellant to sell the unsold reserved units for Bumiputera to the non-Bumiputera. Therefore, the payment is not made wholly and exclusively IN the production of income but it is necessarily FOR the production of income.

[15] The respondent submits that by making the payment to procure the permission from the State Authority, the appellant had obtained advantage in terms of enduring benefit of the business ie, enabling the appellant to sell the units to the non-Bumiputera prior to producing the income and as such is a payment/expenditure which is capital in nature and does not rank for deduction under s. 33(1) ITA.

[16] It is further submitted that the LPHS has imposed penalty on the appellant because the appellant had violated the terms of the quota and as such the penalty imposed on the incorrect assessment made by the appellant is correct and fair based on the facts that the appellant has deducted the expenses that is not deductible under s. 33(1) ITA.

Findings

[17] It is trite that the findings made by the SCIT is generally unassailable. The High Court will only embark on a curial intervention only if it can be shown that the SCIT had proceeded upon some erroneous assumption as to the relevant law (see *Pasdec Corporation Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2016] 10 CLJ 493).

[18] It must be noted that this court in the case of *Taman Equine (M) Sdn Bhd dan Ketua Pengarah Hasil Dalam Negeri* (Rayuan Sivil No: WA-14-21-06-2020) ("*Taman Equine*") had allowed the appellant's appeal in that case and agreed with the earlier decision of the High Court in *Prima Nova*

Harta Development Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri (Rayuan No: WA-14-7-12-2019) ("*Prima Nova Harta*") wherein the same issues arose as in the present case. In both the cases of *Taman Equine* and *Prima Nova Harta* (*supra*), the courts in essence agreed that the payments made by the appellants therein have met the test for deduction under s. 33(1) ITA. Therefore, the main grounds of judgment of this court in the case of *Taman Equine* (*supra*) will also be adopted herein.

[19] It is trite law that in order to qualify for deduction under s. 33(1) ITA, the expenditure must be wholly and exclusively incurred in the production of the tax payer's gross income. Section 33(1) ITA states that:

> Adjusted income generally
>
> 33. (1) Subject to this Act, the adjusted income of a person from a source for the basis period for a year of assessment shall be an amount ascertained by deducting from the gross income of that person from that source for that period all outgoings and expenses wholly and exclusively incurred during that period by that person in the production of gross income from that source, including ...

[20] The question whether a particular payment is capital or revenue is basically a question of fact and every case must be considered on its own facts (see *Ampat Tin Dredging Ltd v. Director-General Of Inland Revenue* [1982] CLJ 193; [1982] CLJ (Rep) 402; [1982] 2 MLJ 46 and *Director-General Of Inland Revenue v. Kulim Rubber Plantations Ltd* [1980] 1 LNS 141; [1981] 1 MLJ 214).

[21] In the instant matter, the SCIT had found that the payments of 7% (commercial units) and the 10% (residential units) by the appellant herein was made by the appellant as it had violated the condition imposed by the State Government before the approval was granted for the release of the Bumiputera units to be sold to the non-Bumiputera. The SCIT found as follows:

> Pemaju yang **telah melanggar syarat** yang telah dikenakan oleh MMKN sebelum kelulusan diperolehi (membuat jualan sebelum kelulusan) akan dikenakan penalti atau denda seperti yang berikut:
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> (i) bagi bangunan kediaman, penalti atau denda sebanyak 12% daripada harga jualan (jumlah 12% tersebut terdiri dari 7% potongan harga Bumiputera + 5% denda kerana melanggar syarat yang telah dikenakan oleh MMKN Selangor);
>
> (ii) bagi bangunan kediaman (Rumah Kos Rendah), penalti atau denda sebanyak 7% daripada harga jualan;
>
> (iii) bagi bangunan perniagaan, penalti atau denda sebanyak 15% daripada harga jualan (jumlah 15% tersebut terdiri dari 10% potongan harga Bumiputera + 5% denda kerana melanggar syarat yang telah dikenakan oleh MMKN Selangor);

(iv) bagi bangunan perusahaan atau industri, penalti atau denda sebanyak 15% daripada harga jualan (jumlah 15% tersebut terdiri dari 10% potongan harga Bumiputera + 5% denda kerana melanggar syarat yang telah dikenakan oleh MMKN Selangor);

(v) pemaju dikehendaki mendaftar dengan LPHS berhubung dengan penjualan Rumah Kos Rendah. Bagi pemaju yang enggan berbuat demikian akan dikenakan denda sebanyak RM500 bagi setiap nama; dan

(vi) semua bayaran hendaklah dibuat di LPHS untuk dimasukkan ke dalam Tabung Wang Amanah Perumahan.

Pemaju **yang diberikan kelulusan** pengurangan atau pelepasan kuota Bumiputera akan dikenakan syarat pemulangan potongan harga Bumiputera sebagai SUMBANGAN kepada Kerajaan Negeri, 7% daripada harga jualan bagi setiap bangunan kediaman yang diberi pengurangan atau pelepasan dan 10% daripada harga jualan bagi setiap bagi bangunan perniagaan dan bangunan perusahaan/industri yang diberi pengurangan atau pelepasan. (emphasis added)

[22] It is of the considered view that the SCIT's finding is flawed. On the one hand, the SCIT stated that the appellant had violated the condition imposed by the State Government. However, the SCIT had also admitted that approval was in fact given to the appellant to release the Bumiputera units to be sold to the non-Bumiputera. So, the payments of 7% (commercial units) and 10% (residential units) to the State Government are payments made for approval to sell the Bumiputera units to the non-Bumiputera. The payments cannot be said to be a fine or penalty because there is in fact no issue of the appellant violating the condition imposed after all.

[23] The respondent argued that the payment was made to obtain permission for the appellant's production of income and that the payment was made to comply with conditions imposed by the State Government whom will allocate certain percentage in order to enable the appellant to effectively generate income. It is contended that the payment was not made wholly or exclusively in the production of income but just "necessarily" for the production of income.

[24] It is of the considered view that the respondent's argument is misconceived. The agreed fact is that without making the payment the Bumiputera units cannot be transferred or released to the non-Bumiputera. It cannot be disputed that without the payments being made, the appellant would not have been able to sell the Bumiputera units to the non-Bumiputera purchasers and generate its income. By selling the Bumiputera lots to non-Bumiputera, it directly generates the appellant's income as a property developer. Once the appellant's business has commenced there can never be a distinction before what is incurred for or in the production of income. The appellant needs to return the Bumiputera discount to the State Government. The character of the payment is unequivocal.

[25] The payment was in fact made in the course of operating the appellant's business. The expenses or payments incurred by the appellant are not just "wholly and exclusively" borne for the purpose of generating income, it is also closely related, incidental and relevant to the appellant's business. Thus, such expenses/payment should be made deductible under s. 33(1) ITA. In *Strong & Co of Romsey Limited v. Woodifield* (1906) AC 448 at p. 452, it was held that in order for an expense to be deductible, it must be closely connected or incidental to the business. Lord Loreburn said as follows:

> In my opinion, however, it does not follows that if a loss is in any sense connected with the trade, it must always be allowed as a deduction; for it may be only remotely connected with the trade, or it may be connected with something else quite as much as or even more than with the trade. I think only such losses can be deducted as are connected with in the sense that they are really incidental to the trade itself. They cannot be deducted if they are mainly incidental to some other vocation or fall on the trader in some character other than that of trader. The nature of the trade is to be considered.

[26] An option is given by the State Government in that if property developers are unable to sell Bumiputera units to Bumiputera purchasers and wish to obtain a release of the said units, the property developers may opt to make a payment to LPHS. The Pekeliling Lembaga Perumahan dan Hartanah Selangor Bilangan 1 Tahun 2011 ("the circular") stated as follows:

> 6.0 PEMULANGAN POTONGAN HARGA BUMIPUTERA DAN DENDA KEPADA KERAJAAN NEGERI
>
> 6.1 Pemaju yang diberikan pelepasan kuota Bumiputera akan dikenakan syarat pemulangan potongan harga Bumiputera kepada LPHS.
>
> 6.2 Pemulangan potongan harga adalah seperti berikut:
>
> (i) Bangunan Kediaman – 7% daripada harga jualan bagi setiap unit yang diberikan pelepasan
>
> (ii) Bangunan Perniagaan – 10% daripada harga jualan bagi setiap unit yang diberikan pelepasan
>
> (iii) Perusahaan/lndustri – 10% daripada harga jualan bagi setiap unit yang diberikan pelepasan

[27] LPHS also further stated in their letter dated 27 May 2013 that:

> 2.1 340 Unit Kompleks/Perniagaan
>
> – Pihak tuan dikenakan syarat bayaran balik potongan harga Bumiputera sebanyak 10% dan 5% caj pelanggaran mekanisme pelepasan kuota Bumiputera daripada harga jualan bagi 21 unit tersebut kepada pentadbiran ini sebelum hakmilik boleh didaftarkan.

A 2.2 20 Tingkat Pangsapuri Yang Mengandungi 266 unit

– Pihak tuan dikenakan syarat bayaran balik potongan harga Bumiputera sebanyak 7% dan 5% caj pelanggaran mekanisme pelepasan kuota Bumiputera daripada harga jualan bagi 23 unit tersebut kepada pentadbiran ini sebelum hakmilik boleh didaftarkan.

B **[28]** The appellant, being unable to sell the Bumiputera units, opted to obtain the release of the units to sell to non-Bumiputera purchasers. It is clearly necessary and integral for the appellant to do so and it cannot be disputed that the payment flowed from the act forming the essence of the appellant's business and done for the purpose to earn revenue. The payment C is therefore unavoidable for otherwise the appellant will not be able to generate its income. So it is obvious that the appellant's purpose or object behind the payment is to procure a benefit, which is purely a business one.

[29] Further, it is of the considered view that the payment is not of capital in nature since the appellant has all along, the right to sell. The payment was D made so as to enable the appellant to widen its group or class of people it can sell to. The payment was therefore business normal payment in order to produce income.

[30] In *British Insulated and Helsby Cables Limited v. Atherton* [1926] AC 205 E at p. 212 of the report, Viscount Cave LC of the House of Lords had stated as follows:

> It was made clear in the above cited cases of *Usher's Wiltshire Brewery v. Bruce (1) and Smith v. Incorporated Council of Law Reporting for England and Wales (2) that a sum of money expended, not of necessity and with a view to a direct and immediate benefit to the trade, but voluntarily and on the grounds of commercial* F *expediency, and in order indirectly to facilitate the carrying on of the business, may yet be expended wholly and exclusively for the purposes of the trade.*
>
> (emphasis added)

[31] The House of Lords in the same case further stated at pp. 213 to 214 G of the report that:

> when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade ... there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital. H

[32] The above principles laid down by the House of Lords in *British Insulated and Helsby Cables Limited* (*supra*) is explained in the textbook, *Malaysian Taxation* by Chin Yoong Kheong at pp. 151 and 152 as follows:

> (a) The expression 'once and for all' does not mean that the payment I should be made in one single sum and at one time. The expression is directed at an expenditure which is made once and for all for procuring an enduring benefit to the business as distinguished from a recurring expenditure in the nature of operational expenses.

(b) An asset or an advantage need not be something material. It may consist of the enrichment of or the improvement to an item of fixed capital.

(c) The expression 'with a view' suggests intention. If the intention at the time the expenditure was incurred was to bring into existence an asset or an advantage or enduring nature, the expenditure will be regarded as capital in nature.

(d) The word 'enduring' means 'enduring in the way that a fixed asset endures'. Enduring, therefore, suggests that the asset or advantage acquired must have enough durability to justify its being treated as a capital asset or advantage.

[33] So in the instant matter, it cannot be disputed that the refunds to LPHS recurs every instance that a Bumiputera lot is sold to a non-Bumiputera buyer, and as such it is a clear indication that the expenditure is revenue, as opposed to capital in nature.

[34] The test is further supported by the case of *Vallambrosa Rubber Co Ltd v. Farmer (Surveyor of Taxes)* 5 TC 529 at p. 536, which also explained that an indication that an expense is capital expenditure instead of income expenditure is whether the capital expenditure is paid once and for all or whereas income expenditure is recurring. The court stated:

Now, I don't say that this consideration is absolutely final or determinative, but in a rough way I think it is not a bad criterion of what capital expenditure as against what is income expenditure to say that capital expenditure is a thing that is going to be spent once and for all, and income expenditure is a thing that is going to recur every year.

[35] Further, the payment made to the State Government *via* the LPHS, cannot be said to have enriched or have improved the asset of fixed capital on the part of the appellant. In the House of Lords case of *Tucker (Inspector of Taxes) v. Granada Motorway Services Ltd* [1979] STC 393 at p. 396, (later affirmed by the House of Lords in *Lawson (Inspector of Taxes) and Johnson Matthey Plc* [1992] 2 AC 324 at p. 336), Lord Wilberforce explained that expenditure on a capital asset which made it more valuable would be capital expenditure. His Lordship explained as follows:

I think that the key to the present case is to be found in those cases which have sought to identify an asset. In them it seems reasonably logical to start with the assumption that money spent on the acquisition of the asset should be regarded as capital expenditure. Extensions from this are, first, to regard money spent on getting rid of a disadvantageous asset as capital expenditure and, secondly, to regard money spent on improving the asset, or making it more advantageous, as capital expenditure. In the latter type of case it will have to be considered whether the expenditure has the result stated or whether it should be regarded as expenditure on maintenance or upkeep, and some cases may pose difficult problems.

[36] In the instant matter, the payment to the LPHS is not to improve the value of the fixed capital for the appellant because the appellant was returning the Bumiputera discount in order not to be in contravention of the circular.

[37] In the case of *Inland Revenue v. Carron Company* 1968 SC (HL) 47, the taxpayer was incorporated by royal charter. The charter seriously impeded the profitable development of the company's business because it limited the company's borrowing powers and also restrictions on share transfers made it difficult to attract executives of a suitable calibre. The company decided to seek a supplementary charter to eliminate these impediments but some dissenting shareholders took legal action to indefinitely delay the matter. Eventually a settlement was negotiated, and the company paid £88,000 to the dissenting shareholders and £3,107 to obtain the supplementary charter. The House of Lords held that an allowable deduction was available for both these items. That money was spent to remove restrictions that prevented profits from being earned. There was no creation of new assets. The removal of the disadvantages by the supplementary charter enabled the company's business to be carried on more efficiently and in its day-to-day trading and therefore the advantage obtained was an income advantage.

[38] In the case of *Kulim Rubber Plantations Ltd* (*supra*) the taxpayer owned extensive rubber plantations. It decided on a new policy by embarking on a large-scale programme of oil palm planting. To implement this policy and to raise funds it decided on selling the more outlying and less profitable rubber estates. The taxpayer had also employed agents and secretaries in the conduct of its business and had agreed that in the event of the sale of the whole or part of the estates, they would be entitled to compensation. The Federal Court held that where a company, in order to get rid of a contract which is of an onerous character or a servant whose continuance in service is undesirable in the company's interest, makes a payment in such circumstances it is properly to be treated as a revenue payment and a deductible expense.

[39] In so far as the enduring benefit and identifiable tests are concerned, the appellant cannot be said to have acquired any asset or advantage for the enduring benefit of its business. There is no asset or enduring benefit that has been acquired by the payment. The case of *Carron Company* (*supra*) makes it clear that a payment made to remove an obstacle to profitable trading did not create any new asset or enduring benefit and is attributable. The passage in *Carron Company* (*supra*) at pp. 57 to 58: is instructive:

> Of course they obtained an advantage: companies do not spend money either on capital or income account unless they expect to obtain an advantage. And money spent on income account, for example on durable repairs, may often yield an enduring advantage. In a case of this kind what matters is the nature of the advantage for which the money was spent.

> This money was spent to remove antiquated restrictions which were preventing profits from being earned. It created no new asset. It did not even open new fields of trading which had previously been closed to the company. Its true purpose was to facilitate trading by enabling the company to engage a more competent manager and to borrow money required to finance the company's traditional trading operations under modern conditions.

[40] In the High Court case of *Luxor Network Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2017] 1 LNS 1714; [2018] 1 MLRH 153, Kamaludin Md Said J (as His Lordship then was) provided explanation on the meaning of enduring benefit, and summarised as follows:

> [18] Therefore, it can be deduced from the above that the term "enduring benefit" means:
>
> (a) Something that endures like a fixed asset;
>
> (b) Not something that endures for a few years that allows a taxpayer to relieve itself of a revenue payment;
>
> (c) Has a right of a permanent character;
>
> (d) Has lasting qualities; and
>
> (e) Enough durability to justify as a capital asset.

[41] The payment made by the appellant herein did not give rise to the acquisition of any identifiable asset. In the High Court case of *Ensco Gerudi (M) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2016] 1 LNS 704; [2016] MLJU 1859, Lau Bee Lan J (as Her Ladyship then was) gave a concise explanation of whether or not there was an identifiable asset created from expenditure. Her Ladyship explained:

> ... whether or not there was an identifiable asset created from the expenditure. If in the affirmative, it is indicative of capital expenditure. This is based on the authority of *CIR v. Carron Company* (45 TC 18), confirmed by this the High Court in *Fernrite Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2004] MSTC 4065, in support of the Court of Appeal case in *ML & 2 Ors v. Ketua Pengarah Hasil Dalam Negeri* [2000] MSTC 3804, and *Southern v. Borax Consolidated Ltd* [1941] 23 TC 597; (...)
>
> 24.1. In *Carron*'s case (*supra*), Lord Reid opined:
>
> > ln a case of this kind what matters is the nature of the advantage for which the money was spent. This money was spent to remove antiquated restrictions which were preventing profits from being earned. It created no new asset. It did not even open new fields of trading which had previously closed to the company ...

[42] There is another aspect of the test in which this court has touched upon in the case of *Taman Equine* (*supra*) ie, the fixed capital vs circulating capital test. The same type of asset may be either a fixed asset or stock-in-trade according to the nature of the business. What is capital asset in the hands of

A one person, may be a trading asset in the hands of another, and the nature of a receipt may consequently vary according to the nature of the trade in connection with which it arises. The units that a property developer builds is part of its stock-in-trade. In the instant matter, the Bumiputera units are the stock-in-trade of the appellant's trade and cannot be said to be related to
B capital asset. The payment was made in order to sell the Bumiputera units. The effect of the payment was to achieve sales of the stock-in-trade.

[43] In *L Sdn Bhd v. Comptroller General Of Inland Revenue* [1985] 1 BLJ 218; [1973] 1 MLJ 57 at p. 58 the court explained that if an expenditure relates to fixed capital (ie, fixed assets), it may be regarded as capital expenditure.
C If an expenditure relates to circulating capital (ie, stock-in-trade), it will be deductible.

[44] In *Taman Equine* (*supra*), this court was also of the considered view that the SCIT had failed to appreciate that nowhere in s. 39(1) ITA stipulates
D that the payment is non-deductible. Section 39(1) provides for the disallowance of the deduction of certain expenses. So, when there is no express provision stipulating that expenses such as the payment herein is non-deductible, it is trite, more so in tax law, that one can only look at what is clearly stated in the Act and nothing is to be read in nor implied.

E **[45]** In *National Land Finance Co-Operative Society Ltd v. Director General Of Inland Revenue* [1993] 4 CLJ 339 at p. 344, the Supreme Court in quoting the principle of strict interpretation in *Cape Brandy Syndicate v. IRC* 12 TC 358 stated as follows:

> There are ample authorities to show that Courts have refused to adopt
F a construction of a taxing Act which would impose liability when doubt exists. In *Re Micklewait* [1855] 11 Exch 452 it was held that a subject was not to be taxed without clear words. We realise that revenue from taxation is essential to enable Government to administer the country and that the Courts should help in the collection of taxes whilst remaining fair to tax payers. Nevertheless, we should remind ourselves of the principle
G of strict interpretation as stated by Rowlatt J. in *Cape Brandy Syndicate v. I.R.C.* (*supra*):
>
> > ... in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in,
> H nothing is to be implied. One can only look fairly at the language used.

[46] In *Exxon Chemical (Malaysia) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2005] 4 CLJ 810 the Court of Appeal through the judgment of Gopal Sri Ram JCA (as he then was) stated that:

I > The maxim in revenue law is this: no clear provision; no tax. If there is any doubt then it must be resolved in the taxpayer's favour. See, *National Land Finance Co-operative Society Ltd v. Director General Of Inland Revenue* [1993] 4 CLJ 339. The corollary of that proposition is that those parts in

a revenue statute that favour the taxpayer must be read liberally. What learned counsel for revenue is asking us to do is to go the other way. That would be standing the true principle on its head.

[47] Furthermore, even if any component of the payment was a penalty or fine, it is of the considered view that it should not prohibit its deductibility. An expense can be deducted despite being penal in nature. The ITA does not specifically provide that a penalty or fine is not a deductible expense. There are no express words to that effect in s. 33(1) ITA.

[48] The facts of the case of *British Columbia Ltd v. Her Majesty The Queen* [1999] 3 SCR 804, underscores the importance of the connection between an expense and the taxpayer's business in so far as deductibility is concerned. In that case, the taxpayer carried on a poultry farm business. The BC Egg Marketing Board established a quota system whereby egg producers in the province were assigned quotas for egg production. Due to local market conditions, the taxpayer decided to produce over-quota. The taxpayer was concerned that if it did not produce over-quota, it would lose its major customer, which was expanding in the area. An inspector from the BC Egg Marketing Board discovered the over-quota on the taxpayer's farm and the taxpayer paid an over-quota levy. The court held that the over-quota levy was an allowable deduction as the levy was incurred as part of the taxpayer's day-to-day operations, and the decision to produce over-quota was a business decision made in order to realise income. The characterisation of the levy as a fine or penalty was of no consequence because the income tax system does not distinguish among levies, fines and penalties.

[49] The case of *Day & Ross Limited v. Her Majesty The Queen* [1977] 1 FC 780 (TD), also suggests that a deduction should be allowed for a fine or penalty imposed for an infraction of the law if the offence can be said to be something that is connected with the business. In that case, the taxpayer carried on a trucking business and claimed a deduction for the fines imposed in respect of the overloading of its vehicles. The court held that the fines resulted from the day-to-day operation of the transport industry and were paid as necessary expenses. The court was of the view that in a highly competitive road transport industry, it would be impractical for the company to have a tight control over the exact cargo weight carried on its trucks. That case was quoted with approval in *Canadian Imperial Bank of Commerce v. Her Majesty The Queen* 2013 FCA 122.

[50] This court is of the further considered view that the appellant will not make further profit again through the reduction of taxable income after deducting these expenses as the appellant declares the full non-Bumiputera price stated in the invoice or sale and purchase agreement as the turnover, and not the discounted Bumiputera purchase price. As such the appellant is merely reducing its taxable income to the true income amount, excluding payments of the Bumiputera discount which the appellant is obliged to pay.

[51] On the issue of penalty, the courts in plethora of cases have stated that the discretion to impose penalty is not unfettered and must be exercised properly and reasonably. Penalties should not be imposed mechanically or automatically (see *Ketua Pengarah Hasil Dalam Negeri v. Kim Thye & Co* [1992] 4 CLJ 2079; [1992] 1 CLJ (Rep) 135; and *BN Ketua Pengarah Hasil Dalam Negeri* [2009] MSTC 3, 828).

[52] The SCIT found that the respondent has properly and reasonably imposed a penalty under s. 113(2) for the year of assessment 2014 (paras 10.45 to 10.50 of CS).

[53] Section 113 of the ITA reads as follows:

113. Incorrect returns

(1) Any person who:

(a) makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or

(b) gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person, shall, unless he satisfies the court that the incorrect return or incorrect information was made or given in good faith, be guilty of an offence and shall, on conviction, be liable to a fine of not less than one thousand ringgit and not more than ten thousand ringgit and shall pay a special penalty of double the amount of tax which has been undercharged in consequence of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct.

(2) Where a person:

(a) makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or

(b) gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person, then, if no prosecution under subsection (1) has been instituted in respect of the incorrect return or incorrect information, the Director General may require that person to pay a penalty equal to the amount of tax which has been undercharged in consequence of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct and, if that person pays that penalty (or, where the penalty is abated or remitted under section 124(3), so much, if any, of the penalty as has not been abated or remitted), he shall not be liable to be charged on the same facts with an offence under subsection (1).

[54] This court is of the considered view that the wordings in s. 113(1) and (2) ITA do not apply to situations where there is a difference of opinion between the respondent and the taxpayer on the interpretation of a particular provision of the ITA even where the court ultimately finds in favour of the respondent. This is not a case where the taxpayer had filed an incorrect return by omitting or understating its income or gave incorrect information relating matter affecting its chargeability to tax. The appellant had taken reasonable and genuine position in submitting its returns and took the view that the payments made to the State Government were deductible.

[55] This court finds that the facts of the case disclose that the appellant had acted in good faith and made full disclosure. In *Ketua Pengarah Hasil Dalam Negeri v. Firgos (M) Sdn Bhd* [2014] 8 CLJ 943, Zaleha Yusof J (as Her Ladyship then was) stated as follows:

> [17] On the second issue, even the appellant's witness agreed that all the capital expenditures claimed for reinvestment allowance purposes were actually incurred by the respondent. During the cross-examination, he agreed that the respondent had made full disclosure in the Borang that were submitted in the Years of Assessment 2005-2007 and agreed that the audit team did not discover anything contrary to the information disclosed in the Borang. I therefore agree with the SCIT that the respondent had acted in good faith and made full disclosure. In *Ketua Pengarah Hasil Dalam Negeri v. Kim Thye & Co* [1992] 4 CLJ 2079; [1992] 1 CLJ (Rep) 135; [1992] 2 MLJ 708 it was highlighted that s. 113(2) of the ITA is not a mandatory provision. This section clearly confers discretion on the appellant as to whether penalty should be imposed or not. What more the matter in dispute arose as a result of technical adjustment ie, due to a differing interpretation of the tax legislation by the respondent. Therefore, the decision of the SCIT in the second issue to my mind is also correct.

Conclusion

[56] The decision of the SCIT is wrong in law in light of the clear statutory provisions that supports the fact that the payment made by the appellant is deductible. There are merits in this appeal. The appeal was therefore allowed and the decision of the SCIT, reversed.